



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 145

RIN 3038-AE57

Revisions to Freedom of Information Act Regulations

AGENCY: Commodity Futures Trading Commission.

ACTION: Interim final rule with request for comments.

SUMMARY: The Commodity Futures Trading Commission (the “Commission”) is revising certain provisions of its regulations for disclosing records under the Freedom of Information Act (“FOIA”) to comply with the FOIA Improvement Act of 2016. In addition, the regulations would streamline the language of procedural provisions concerning initial determinations and administrative appeals. The regulations have also been updated to incorporate changes in the Commission’s administrative structure, remove superfluous verbiage, and correct inaccurate text.

DATES: *Effective Date:* This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Comment Date: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Comments submitted by mail will be accepted as timely if they are postmarked on or before that date.

ADDRESSES: You may submit comments, identified by RIN 3038-AE57, by one of the following methods:

- CFTC website: <https://comments.cftc.gov>. Follow the instructions for submitting comments through the Comments Online process on the website.
- Mail: Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as Mail, above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one method.

Instructions: All submissions received must include the agency name and RIN number for this rulemaking. For additional details on submitting comments, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Candace Ambrose, Counsel, Office of the General Counsel, (202) 418-5192.

SUPPLEMENTARY INFORMATION: This rule revises the Commission’s FOIA regulations to incorporate certain changes codified by the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (June 30, 2016) (“Act”). The Act requires each agency to review its regulations and issue new regulations in accordance with the Act’s provisions. The Act requires agencies to notify requesters of the availability of dispute resolution services from the agency’s FOIA Public Liaison and the National Archives and Records Administration’s Office of Government Information Services (“OGIS”). The Act also incorporates the Department of Justice’s foreseeable harm standard, specifying

that an agency shall withhold information only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption. 5 U.S.C.

552(a)(8)(A)(i)(I). This provision requires agencies to consider whether partial disclosure is possible and to take reasonable steps to segregate and release nonexempt information. In accordance with the Act, this rule incorporates the sunset provision for the deliberative process privilege. The Act also increases the time limit for requesters to file an administrative appeal to 90 days. This rule updates the Commission's regulations in 17 CFR part 145 to incorporate those statutory changes. This rule also contains several technical amendments to reflect the Commission's current organizational structure, eliminate unnecessary text, and correct erroneous citations.

Section 145.0 (Definitions) is revised to (1) eliminate the term Assistant Secretary because the position referred to – Assistant Secretary of the Commission for FOI, Privacy, and Sunshine Acts Compliance – is defunct; (2) update the definition of Compliance Staff to reflect the current organizational structure; and (3) add paragraph letters before each defined term for easier cross-reference throughout part 145.

Section 145.4 (Public records available with identifying details deleted; nonpublic records available in abridged or summary form) is revised to update cross-references with the paragraph letters corresponding to the defined terms.

Section 145.5 (Disclosure of nonpublic records) is revised to incorporate the foreseeable harm standard codified by the Act, which provides that an agency shall withhold information under FOIA only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption, or disclosure is prohibited by law. This section is also revised to reflect the requirement in the Act that agencies consider

whether partial disclosure of information is possible whenever agencies determine that full disclosure of a requested record is not possible.

Paragraph (e) of § 145.5 is revised to include the three traditional privileges incorporated into Exemption 5 of FOIA and to conform to the requirement of the Act which states that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested. This paragraph is also revised to remove superfluous text concerning Exemption 5.

Section 145.6 (Commission offices to contact for assistance; registration records available) is revised to reflect the current addressee for requests for non-public records and to reflect the current addresses for the regional offices.

Paragraph (b) of § 145.7 (Requests for Commission records and copies thereof) is revised to indicate to whom requests for nonpublic records should be addressed and to delete references to Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance since that position is defunct, as noted above.

Paragraph (c) of § 145.7 is revised to remove oral requests for records because requests for records should be submitted in a written format for record keeping purposes and to eliminate unnecessary text concerning misdirected requests.

Paragraph (f) of § 145.7 is revised to replace the term Assistant Secretary with Office of General Counsel because the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance position is defunct.

Paragraph (g) of § 145.7 is revised to correct erroneous text and to replace the term Assistant Secretary with Office of General Counsel because the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance position is defunct.

Paragraph (h) of § 145.7 is revised to replace references to Assistant Secretary with the term Compliance Staff or Office of General Counsel where appropriate. This paragraph is also revised to incorporate the Act's requirement that an affirmative determination informs the requester of the availability of assistance from the FOIA Public Liaison. Additionally, this paragraph is revised to incorporate the Act's requirement that an adverse determination informs the requester of the right to seek dispute resolution services from the FOIA Public Liaison and from OGIS. Further, this paragraph is revised to provide requesters an opportunity to modify the request and to seek assistance from the FOIA Public Liaison if the request involves unusual circumstances. This paragraph is also revised to conform to the requirement under the Act that agencies inform requesters of the right to seek dispute resolution services from OGIS if the request involves unusual circumstances.

Paragraph (i) of § 145.7 is revised to extend the time to file an administrative appeal to 90 days in conformity with the Act. Further, this paragraph is revised to include the requirement under the Act to inform the requester of mediation services offered by OGIS. This paragraph is also revised to streamline the process for administrative reviews and to replace the term Assistant Secretary with the term Compliance Staff because the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance position is defunct. Moreover, this paragraph corrects typographical errors.

Paragraph (j) of § 145.7 is revised to replace the term Assistant Secretary with the term Compliance Staff because the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance position is defunct.

Section 145.8 (Fees for records services) is revised to replace the term Assistant Secretary with the term Compliance Staff because the Assistant Secretary of the Commission for FOI, Privacy and Sunshine Acts Compliance position is defunct.

Public Participation

The Commission is issuing an interim rule to revise its FOIA regulations because these changes merely reflect the statutory amendments to FOIA that are contained in the Act. This approach enables these regulatory changes to take effect sooner than would be possible with the publication of a Notice of Proposed Rulemaking in advance.

Nonetheless, the Commission welcomes public comments from interested persons regarding any aspect of the changes made by this interim final rule. Please refer to the **ADDRESSES** section above. The Commission will consider all public comments in drafting the final rule.

All comments must be submitted in English, or if not, accompanied by an English translation. Except as described below regarding confidential business information, all comments are considered part of the public record and will be posted as received to <http://comments.cftc.gov> for public inspection. The information made available online includes personal identifying information (such as name and address) which is voluntarily submitted by the commenter. You should submit only information that you wish to make available publicly.

If you want to submit material that you consider to be confidential business information as part of your comment, but do not want it to be posted online, you must submit your comment by mail or hand delivery/courier and include a petition for

confidential treatment as described in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the rulemaking record and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

Regulatory Certifications

Administrative Procedure Act. The Administrative Procedure Act (“APA”), 5 U.S.C. 553 *et seq.*, requires federal agencies to publish a notice of proposed rulemaking and provide an opportunity for public comment before issuing a new rule. Rules are exempt from notice and comment if they are interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. 5 U.S.C. 553(b)(3)(A). The Commission has determined that this exception applies. The subject rules do not change the substantive standards the agency applies in implementing FOIA to the extent they conform to the changes codified in the Act. Also, the Commission has determined that the rules concern its organization, procedure, and practice because they make updates to accurately reflect the organizational structure of the agency. Furthermore, an agency may also issue a new rule without a pre-publication public comment period when it for “good cause” finds that prior notice and comment is “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(3)(B). The Commission has determined

that there is good cause to find that a pre-publication comment period is unnecessary. These revisions to the existing regulations in 17 CFR part 145 codify statutory changes and are technical-administrative in nature. For these reasons, the Commission's implementation of this rule as an interim final rule, with provision for post-promulgation public comment, is in accordance with section 553(b) of the APA.

Regulatory Flexibility Act. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. This rule amends the Commission's FOIA regulations to incorporate certain statutory changes required by the Act, and to reflect updates to the Commission's internal administrative structure and to make editorial changes to the regulations. Because the Commission is not required to publish a notice of proposed rulemaking for this rule, a regulatory flexibility analysis is not required. 5 U.S.C. 603(a).

Paperwork Reduction Act. The Paperwork Reduction Act ("PRA"), 5 U.S.C. 3501 *et seq.*, imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information. This rule does not contain any new collection of information requirements within the meaning of the PRA. Thus, the PRA is inapplicable to this rule.

List of Subjects in 17 CFR Part 145

Administrative practice and procedure, Freedom of information.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 145 as set forth below:

PART 145—COMMISSION RECORDS AND INFORMATION

1. The authority citation for part 145 is revised to read as follows:

Authority: Pub. L. 99-570, 100 Stat. 3207; Pub. L. 89-554, 80 Stat. 383; Pub. L. 90-23, 81 Stat. 54; Pub. L. 98-502, 88 Stat. 1561-1564 (5 U.S.C. 552); Sec. 101(a), Pub. L. 93-463, 88 Stat. 1389 (5 U.S.C. 4a(j)); Pub. L. No. 114-185, 130 Stat. 538; unless otherwise noted.

Section 145.5 is also issued under 5 U.S.C. 552, 5 U.S.C. 552b, and secs. 2(a)(11), 4b, 4f, 4g, 5a, 8a, and 17 of the Commodity Exchange Act, 7 U.S.C. 2, 4a(j), 6b, 6f, 6g, 7a, 12a, and 21, as amended, 92 Stat. 865 *et seq.*; secs. 2(a)(1), 4c(a)-(d), 4d, 4f, 4g, 4k, 4m, 4n, 8a, 15 and 17, Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)-(d), 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b); secs. 2(a)(11) and 8 of the Commodity Exchange Act, 7 U.S.C. 4(j) and 12 (1983); secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982); 5 U.S.C. 552 and 552b.

Section 145.6 is also issued under 7 U.S.C. 2, 4, 6, and 12; secs. 2(a)(1), 4c, 4d, 4e, 4f, 4k, 4m, 4n, 4p, 8, 8a and 19 of the Commodity Exchange Act (7 U.S.C. 2 and 4, 6c, 6d, 6e, 6f, 6k, 6m, 6n, 6p, 12, 12a and 23 (1982)); 5 U.S.C. 552 and 552b.

Section 145.8 is also issued under 7 U.S.C. 4a(j) and 16a as amended by Pub. L. 97-444, 96 Stat. 2294 (1983), and 5 U.S.C. 552, 552a and 552b.

2. Revise § 145.0 to read as follows:

§ 145.0 Definitions.

For the purposes of part 145 the following definitions are applicable:

(a) *Compliance staff* – refers to the FOI Compliance Staff of the Office of General Counsel at the Commission’s principal office in Washington, DC assigned to respond to requests for information and to handle various other matters under the Freedom of Information Act.

(b) *Public records* – in addition to the records described in § 145.1 (material published in the *Federal Register*) and in § 145.2 (records required to be made publicly available under the Freedom of Information Act), includes those records that have been determined by the Commission to be generally available to the public directly upon oral or written request from the Commission office or division responsible for the

maintenance of such records. A compilation of Commission records routinely available to the public upon request appears in appendix A to this part 145.

(c) *Nonpublic records* – are records not identified in § 145.1, § 145.2, or appendix A of this part 145. Nonpublic records must be requested, in writing, in accordance with the provisions of § 145.7.

(d) *Record* – is any information or agency record maintained by the Commission in any format, including an electronic format. It includes any document, writing, photograph, sound or magnetic recording, videotape, microfiche, drawing, or computer-stored information or output in the possession of the Commission. The term “record” does not include personal convenience materials over which the Commission has no control, such as appointment calendars and handwritten notes, which may be retained or destroyed at an employee’s discretion.

3. Amend § 145.4 by revising the first sentence of paragraph (a) and by revising paragraph (b) to read as follows:

§ 145.4 Public records available with identifying details deleted; nonpublic records available in abridged or summary form.

(a) To the extent required to prevent a clearly unwarranted invasion of personal privacy, the Commission may delete identifying details when it makes available “public records” as defined in § 145.0(b). * * *

(b) Certain “nonpublic records,” as defined in § 145.0(c), may, as authorized by the Commission, be made available for public inspection and copying in an abridged or summary form, with identifying details deleted.

4. In § 145.5, revise the introductory text and paragraph (e) to read as follows:

§ 145.5 Disclosure of nonpublic records.

The Commission shall withhold information in “nonpublic records,” as defined in § 145.0(c), only if the Commission reasonably foresees that disclosure would harm an interest protected by an exemption described in paragraphs (a) through (i) of this section, or if disclosure is prohibited by law. The Commission shall consider whether partial disclosure of information is possible whenever the Commission determines that a full disclosure of the requested record is not possible. The Commission shall take reasonable steps necessary to segregate and release nonexempt information in “nonpublic records” subject to a request under § 145.7 if those portions do not fall within an exemption described in paragraphs (a) through (i) of this section.

* * * * *

(e) Inter-agency or intra-agency memoranda or letters, except those which by law would routinely be made available to a party other than an agency in litigation with the Commission. Exemption 5 (5 U.S.C. 552(b)(5)) protects inter-agency or intra-agency communications that are protected by legal privileges, such as the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege. The deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

* * * * *

5. In § 145.6, revise paragraph (a) to read as follows:

§ 145.6 Commission offices to contact for assistance; registration records available.

(a) All requests for non-public records shall be made in writing and shall be addressed or otherwise directed to the Office of General Counsel, Commodity Futures

Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. Requests for public records directed to a regional office of the Commission pursuant to § 145.2 should be sent to:

Commodity Futures Trading Commission, 140 Broadway, 19th Floor, New York, New York 10005, Telephone: (646) 746-9700.

Commodity Futures Trading Commission, 525 West Monroe Street, Suite 1100, Chicago, Illinois 60661, Telephone: (312) 596-0700.

Commodity Futures Trading Commission, 4900 Main Street, Suite 500, Kansas City, Missouri 64112, Telephone: (816) 960-7700.

* * * * *

6. Amend § 145.7 as follows:

- a. Revise paragraphs (b), (c), (f), and (g);
- b. Revise paragraphs (h)(1) and (2) and paragraph (h)(3) introductory text;
- c. Revise paragraphs (i)(2) and (5), (i)(6) introductory text, and (i)(6)(iii) and (i)(7); and
- d. Revise paragraph (j).

The revisions read as follows:

§ 145.7 Requests for Commission records and copies thereof.

* * * * *

(b) *Requests for nonpublic records.* Except as provided in paragraph (a) of this section with respect to public records, all requests for records maintained by the Commission shall be in writing, shall be addressed to the Office of General Counsel of the Commission and shall be clearly marked “Freedom of Information Act Request.”

(c) *Misdirected written requests.* The Commission cannot ensure that a timely or satisfactory response will be given to requests for records that are directed to the Commission other than in the manner prescribed in paragraph (b) of this section. Any misdirected written request for nonpublic records should be promptly forwarded to the Office of General Counsel of the Commission. Misdirected requests for nonpublic records will be considered to have been received for purposes of this section only when they actually have been received by the Office of General Counsel.

* * * * *

(f) *Request for existing records.* The Commission's response to a request for nonpublic records will encompass all nonpublic records identifiable as responsive to the request that are in existence on the date that the written request is received by the Office of General Counsel. The Commission need not create a new record in response to a FOIA request.

(g) *Fee agreement.* A request for copies of records pursuant to paragraph (b) of this section must indicate the requester's agreement to pay all fees that are associated with the processing of the request, in accordance with the rates set forth in appendix B to this part, or the requester's intention to limit the fees incurred to a stated amount. If the requester states a fee limitation, no work will be done that will result in fees beyond the stated amount. A requester who seeks a waiver or reduction of fees pursuant to paragraph (b) of appendix B of this part must show that such a waiver or reduction would be in the public interest. If the Office of General Counsel receives a request for records under paragraph (b) of this section from a requester who has not paid fees from a

previous request in accordance with appendix B of this part, the staff will decline to process the request until such fees have been paid.

(h) *Initial determination, denials.* (1) With respect to any request for nonpublic records as defined in § 145.0(c), the Compliance Staff of the Commission will forward the request to the Commission divisions or offices likely to maintain records that are responsive to the request. If a responsive record is located, the Compliance Staff will, in consultation with the Commission office in which the record was located, determine whether to comply with such request. The Compliance Staff may, in their discretion, determine whether to comply with any portion of a request for nonpublic records before considering the remainder of the request. The Compliance Staff will inform the requester of the availability of the Commission's FOIA Public Liaison to offer assistance.

(2) Where it is determined to deny, in whole or in part, a request for nonpublic records, the Compliance Staff will notify the requester of the denial, citing applicable exemptions of the Freedom of Information Act or other provisions of law that require or allow the records to be withheld. The Compliance Staff's response to the FOIA request should describe in general terms what categories of documents are being withheld under which applicable FOIA exemption or exemptions. The Compliance Staff's response will include a statement notifying the requester of the right to seek dispute resolution services from the Commission's FOIA Public Liaison and the National Archives and Records Administration's Office of Government Information Services. The Compliance Staff, in denying an initial request for records, is not required to provide the requester with an inventory of those documents determined to be exempt from disclosure.

(3) The Compliance Staff will issue an initial determination with respect to a FOIA request within twenty business days after receipt by the Office of General Counsel. In unusual circumstances, as defined in this paragraph, the prescribed time limit may be extended by written notice to the person making a request for a record or a copy. The notice shall set forth the reasons for the extension and the date on which a determination is expected to be dispatched. Where the extension exceeds ten business days, the Compliance Staff will provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The Compliance Staff or the FOIA Public Liaison is available to assist the requester in unusual circumstances. The Compliance Staff will notify the requester of the right to seek dispute resolution services from the Office of Government Information Services. As used in this paragraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of a particular request:

* * * * *

(i) * * *

(2) An application for review must be received by the Office of General Counsel within 90 days of the date of the denial by the Compliance Staff. This 90-day period shall not begin to run until the Compliance Staff has issued an initial determination with respect to all portions of the request for nonpublic records. An application for review shall be in writing and shall be marked “Freedom of Information Act Appeal” and be sent to the Commission’s Office of General Counsel. If the appeal involves information as to which the FOIA requester has received a detailed written justification of a request for

confidential treatment pursuant to § 145.9(e), the requester must also serve a copy of the appeal on the submitter of the information.

* * * * *

(5) If the appeal involves information that is subject to a petition for confidential treatment filed under § 145.9, the submitter of the information shall have an opportunity to respond in writing to the appeal within 10 business days of the date of filing the appeal. Any response shall be sent to the Commission's Office of General Counsel. Copies shall be sent to the person requesting the information.

(6) The General Counsel, or his or her designee, shall have the authority to consider all appeals under this section from initial determinations of the Compliance Staff of the Commission. The General Counsel, or his or her designee, may:

* * * * *

(iii) Remand the matter to the Compliance Staff—

(A) To correct a deficiency in the initial processing of the request, or

(B) When an investigation as to which the staff originally claimed exemption from mandatory disclosure on the basis of 5 U.S.C. 555(b)(7)(A) or 7 U.S.C. 12(a) is subsequently closed; or

* * * * *

(7) If the initial denial of the request for nonpublic records is reversed, the Office of General Counsel shall, in writing, advise the requester that the records will be available on or after a specified date. If, on appeal, the denial of access to a record is affirmed in whole or in part, the person who requested the information shall be notified in writing of:

- (i) The reasons for the denial,
- (ii) The mediation services offered by the Office of Government Information Services as a non-exclusive alternative to litigation, and
- (iii) The provisions of 5 U.S.C. 552(a)(4) providing for judicial review of a determination to withhold records.

(j) *Expedited processing.* A request may be given expedited processing if the requester demonstrates a compelling need for the requested records. For purposes of this provision, the term “compelling need” means: That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged federal government activity. A requester who seeks expedited processing must demonstrate a compelling need by submitting a statement that is certified by the requester to be true and correct to the best of that person’s knowledge and belief. The Compliance Staff will determine whether to provide expedited processing, and notice of the determination will be provided to requester, within ten days after the date of the request. If the request for expedited processing is denied, the requester may file an appeal with the Office of General Counsel within ten days of the date of the denial by the Compliance Staff. The Office of General Counsel will respond to the appeal within ten days after the date of the appeal.

7. Revise § 145.8 to read as follows:

§ 145.8 Fees for records services.

A schedule of fees for record services, including locating, and making records available, and copying, appears in appendix B to this part. Copies of the schedule of fees may also be obtained upon request made in person, by telephone or by mail from the Compliance Staff or at any regional office of the Commission.

Issued in Washington, DC, on June 14, 2017, by the Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

**Appendix to Revisions to Freedom of Information Act Regulations—Commission
Voting Summary**

On this matter, Acting Chairman Giancarlo and Commissioner Bowen voted in the affirmative. No Commissioner voted in the negative.

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